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Peter McCormick*

Duets, Not Solos: The McLachlin Court's Co-Authorship Legacy

This article explores the recent phenomenon of the formal co-authorship of Supreme Court decisions. It begins with a short history of the practice, primarily in the closing years of the Lamer Court but expanding steadily under McLachlin. A closer investigation reveals two critically important dimensions: first, the practice is skewed toward the Court's more important decisions (measured in terms of subject matter, legal complexity, interveners, and subsequent citation); and second, its diffusion across the Court's membership refutes the possibility that it simply reinforces persisting cleavages. This new practice represents a more overtly collegial format directed to the Court's more significant decisions. At the same time, however, it diffuses traditional judicial accountability anchored in the solo attribution of reasons for judgment. In conclusion, the article suggests that the emergence of the co-authorship style should be seen as a new "third phase" in the historical evolution of the Court's judgment-presentation style.

Cet article examine le phénomène récent de la cosignature officielle des décisions de la Cour suprême. Il commence par un bref historique de la pratique, principalement au cours des dernières années de la Cour Lamer, mais elle prend de l'ampleur sous McLachlin. Une enquête plus approfondie révèle deux dimensions d'une importance critique : premièrement, la pratique est biaisée en faveur des décisions les plus importantes de la Cour (mesurées en termes d'objet, de complexité juridique, d'intervenants et de citations ultérieures); et deuxièmement, sa diffusion parmi les membres de la Cour réfute la possibilité qu'elle renforce simplement des clivages persistants. Cette nouvelle pratique représente une avenue plus ouvertement collégiale pour les décisions les plus importantes de la Cour. En même temps cependant, elle diffuse la responsabilité judiciaire traditionnelle ancrée dans l'attribution à une seule personne des motifs d'un jugement. En conclusion, l'article suggère que l'émergence de ce style de copaternité devrait être considérée comme une nouvelle « troisième phase » dans l'évolution historique du style de présentation des arrêts de la Cour.

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Introduction

Why two? More specifically, why two judges jointly co-authoring the reasons for judgment in a Supreme Court decision, rather than the more normal attribution to a single judge that has long been the Canadian practice and continues to be routine in comparable common law countries?

But two is what we now often find. As a recent example: on 26 July 2017, in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*,[1] the Supreme Court handed down an important decision dealing with the constitutional and treaty rights of an Inuit community in Nunavut. The central issue was the National Energy Board's authorization of seismic testing for oil and gas, and the question was whether the government's duty to consult with the relevant Aboriginal groups, and the opportunity of such groups to participate in the approval process, had been adequately met. Reversing

1. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069.

the decision of the Federal Court of Appeal, the Supreme Court found that the duty to consult had not been satisfied, and it quashed the authorization. In the process, it significantly clarified the procedural implications of the constitutional duty to consult, such that the decision has implications that go far beyond the immediate case.

This was a unanimous decision of a nine-judge panel, and the 6500-word judgment of the Court was delivered by Karakatsanis and Brown. But why "Karakatsanis and Brown"? Why not "Karakatsanis" or "Brown"? Until recently—I will later in this article be more specific about how recently—we would have expected and always received a set of reasons attributed to a single justice (the unusual and comparably recent practice of "By the Court" aside). The modern Court has made it clear that this is now qualified by a "circulate and revise" process that makes the final decision something of a collegial product.[2] But in *Clyde River*, without any explanation, the attribution is to a pair of judges.

Nor, as this article will demonstrate, is this particularly unusual these days—the decision in a companion case handed down the same day was also co-authored by this same pair of judges.[3] And the next day the reasons for judgment in a completely unrelated case were jointly authored by Wagner and Gascon, with jointly authored separate concurring reasons by Brown and Rowe.[4] And a day later, there was another completely unrelated case, again with a judgment jointly authored by Wagner and Gascon.[5] That is five sets of co-authored reasons in three days, four of them judgments, embracing three different pairs of judges who together make up a majority of the current members of the Court. This is something more than a casual aberration; it is on the way to becoming routine, but a routine that has been little noted.

So, to return to the opening query, why two judges? What is there about the particular case, or the current personnel of the Court, or the former Chief Justice, that makes this recent novelty so routine that none of the media reports even mention it? And how does it fit in with the Court's own descriptions of its decision-making procedures, described in outline

2. See *Wewaykum Indian Band v Canada*, 2003 SCC 45, at para 92, [2003] 2 SCR 259.
3. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, [2017] 1 SCR 1099.
4. *Quebec (Attorney General) v Guerin*, 2017 SCC 42, [2017] 2 SCR 3 [*Guerin*].
5. *Uniprix inc v Gestion Gosselin et Berube inc*, 2017 SCC 43, [2017] 2 SCR 59.

in *Wewayakum* and clarified in a number of journal articles and books?[6] Is the joint authorship the product of the initial judgment assignment at the post-hearing judicial conference, or does it emerge from the circulate-and-revise process that modifies a solo-judge initial set of reasons for judgment? How common is it becoming? When did it begin, and how likely is it to continue? And why does it matter—what does it tell us about the Supreme Court's evolving sense of its own role and about the style of self-presentation that is appropriate to such a role? This article will seek to answer all these questions through an empirical investigation of the Supreme Court's decisions.

This article is something more than a simple up-dating of a piece written a decade ago that drew attention to the phenomenon.[7] The tone of that earlier article reflected the fact that it seemed to be describing a practice in decline, that seemed to be becoming less frequent, presumably because the two most prominent practitioners (Cory and Iacobucci) had both left the Court. The year in which that article appeared was the recent low point for co-authorships of both decisions and minority opinions; as a consequence, it ended a little plaintively. Having painted itself into the cul-de-sac of linking the practice to a specific handful of judges, and treating it as a single bloc of cases rather than an emerging and evolving protocol, it effectively reduced the phenomenon to a curiosity, and probably a passing one at that.

The article that follows will present quite a different picture. The frequency of co-authorships of both judgments and minority reasons is very much on the rise—so much so that this article will focus entirely on co-authored judgments and ignore their minority reason counterparts. Not only are such cases more frequent, but their use is clearly tilted toward the significant rather than the routine. Iacobucci may be gone, but McLachlin and LeBel carried the flag until a new lead practitioner of co-authorship emerged in the person of Chief Justice Wagner. Co-authorship clearly matters more than it did a decade ago, and much more than it did when it first emerged two decades ago; the fact that it figures most prominently in the participation of the more junior members of the Court suggests strongly that it will matter even more in the future. The challenge is to explain why

6. See, e.g., Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36:3 UTLJ; Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998); Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2012); Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).

7. Peter McCormick, "Sharing the Spotlight: Co-Authored reasons on the Modern Supreme Court of Canada" (2011) 34:1 Dal LJ 165 [McCormick, "Sharing the Spotlight"].

this change is taking place. The double argument of the title is first, that the major shift to the new practice of co-authorship occurred under former Chief Justice McLachlin; and second, that the shift is important enough, and fundamental enough, that it deserves to be identified as such.

I. *Why does it matter?*

The obvious question is—does this sort of change matter? In a number of ways, it does not. The outcome of the case remains solid, regardless of whether it was formally declared by a single judge, or by a duo of judges, or anonymously attributed to "The Court." Similarly, the precedential implications of the decision, of the way that it has dealt with the string of legal questions that led up to that outcome, remains equally solid. Nor does it make any difference to present or future litigants, and the way that they make their decision to appeal and prepare their legal presentations.

Neither input or output has changed, but the way the Supreme Court receives and processes the one so as to deliver the other has been constantly evolving, and these changes do matter. When the Supreme Court began holding regular post-hearing conferences in the early 1960s to move away from the scattering of solo judgments, that mattered.[8] When the Court in the late 1960s stopped using the term "the judgment" for every set of judicial reasons and reserved the term for the specifically labeled majority reasons, that mattered. And when the Court in the 1990s developed a new single-package conversational judgment style, with the majority reasons drafted first and minority reasons responding to them ("I have read the reasons") in a focused way ("but cannot agree with respect to X"), that mattered as well.[9] This current shift away from the solo-attributed accountability of a specific member of the Court to shifting pairs and trios, and occasionally and anonymously to the whole panel, is the latest stage of this evolution in judicial self-presentation.

It matters all the more because the practice has become so pervasive, such that the largely unnoticed shift has come to make up such a significant portion of the caseload. It applies to all types of law, but especially to constitutional cases (for the Charter, federalism, and First Nations law alike) and public law cases. In recent years it has involved an increasing share of the caseload, including a disproportionate share of the cases with the most impressive citation tracks. It embraces all members of the Court, but especially the more junior members who will dominate the Court for

8. See Peter Hogg & Ravi Amarnath, "Why Judges Should Dissent" (2017) 67:2 UTLJ [Hogg & Armanath].

9. Peter McCormick, "Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons" (2009) 32:1 Dal LJ 35 [McCormick, "Structures of Judgment"].

the next few decades. This important shift from individual judges to a more deliberately institutional presentation will gradually but inevitably change how we think and talk and write about the Court. We will find the academic writings of the 1990's, with their cheerful attribution of the right to counsel doctrine to Lamer, or the evolution of the framing of section 15 to L'Heureux-Dubé, or the Crown disclosure implications of "full answer and defence" to Sopinka, strangely quaint. Only a much more nuanced analysis will be capable of dealing with the subtleties of the constantly shifting partnerships.

As one practical example: when the Supreme Court first tackled the meaning of the Charter guarantee of trial within a reasonable time in *Askov*,[10] it was Cory who delivered the reasons and bore the brunt of the criticism when the statistical basis of his reasons turned out to be flawed.[11] But when the Court revisited this same question in *Jordan*,[12] laying down new and stricter standards to an extent that caused consternation in the offices of the various provincial attorneys-general, the reasons for judgment were attributed not to any single member of the Court but rather to the trio of Moldaver, Karakatsanis and Brown. Any praise or blame that flows from this decision, and there has been a fair amount of both, will not be directed to a single judge but rather be diffused among the three. The result of this practice—indeed, perhaps the point of the change—is this deflection of attention from a particular individual to the broader institution, and this is why it is worth noting.

The style and format of presentation matters because they both reflect and shape role and role perception. Let me make this point in terms of recent current events. Within the last two years of the time of writing, two U.S. Presidents have made public announcements about the issue of transgender service in the armed forces. For the first of the two, Barack Obama, the announcement took the form of an eloquent public statement, clearly laying out the policy change, the reasons for it, and how and when it would be implemented. For the second, Donald Trump, it came out of the blue in the form of a cryptic middle-of-the-night Twitter feed. Put aside one's judgment of the two individuals, put aside one's opinion of the respective policies, even put aside the fact that Trump seems to have blind-sided not only the general public but the Pentagon as well. Instead, think about how Trump's Twitter tactics reflect a different conception of

10. *R v Askov*, [1990] 2 SCR 1199.
11. See Carl Baar, "Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy Making" (1993) 72:3 Can Bar Rev 305.
12. *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

the role of the presidency, and of the relationship between the President as leader and his supporters, and of how this interacts with the role of the traditional news media. This is in part a matter of personality and personal style, but it is also a question of dramatically different conceptions of the Presidential role, of the nature of Presidential leadership, and of the communication strategies that serve that new role. Role and message style are a coherent package; changes in one require corresponding changes in the other, and changes in technology impact both. And once such a change has been made, there is no going back; future Presidents will be (will have to be) more like Trump than Obama.

The changes to which I am drawing attention are less dramatic, and I am not suggesting that any future Chief Justice will or should start using their Twitter account in any comparable way. In their own way, however, these changes are still very important in terms of the evolution of the institution of the Supreme Court. Indeed, it is all the more important because although the Supreme Court (and courts in general) have very strong functional reasons for emphasizing tradition and continuity and downplaying innovation, they are in fact adapting all the time to changes in context and expectations. Like other such changes, they represent a mixture of intention, aspiration and response, and this is a question I will address in the conclusion.

I will proceed by dealing with a logical sequence of questions: First, when did the practice of co-authorship begin? How far back does it go, under what circumstances did it emerge, and which specific judges can we connect with the innovation? Second, how often does it happen? Does it happen often enough to merit attention, and is it trending up or down or steady state? Third, which judges on the Court have been the most active participants in the practice, and how concentrated is co-authorship behavior? Is it limited to a small segment of the judges signing on with each other, or is it more widespread? Does it identify persistent subsets of judges dividing on a series of issues, or do the partnerships span the Court? Fourth, how significant or insignificant are the general run of cases for which it is deployed? Are we looking at significant decisions with real precedential implications, or the more routine decisions that will cast a negligible shadow across the citation tracks? Fifth, how does the co-authorship phenomenon fit into the decision-making process that the Court has several times described to us—that is to say, does it emerge from the initial post-hearing judicial conference, or is it a subsequent accommodation to the way that other members of the panel respond critically to a solo-authored first draft? Sixth, what is co-authorship all about? What might the reasons be for a recent trend toward more explicit

collaboration within an established institution? What might we learn from the consideration of parallel developments in related fields such as the legal academic journals? Seventh, where is this taking us? Does it link with other recent developments in the practices of the Supreme Court? What will the future Court look like if these tendencies persist? If this practice reveals to us a way that Chief Justice McLachlin has presided over a major and enduring change to the way that the Supreme Court of Canada handles its business and presents itself—and that is indeed my contention—then what are the other aspects of the change and where is it taking us?

As preliminary answers: the practice is recent, dating back at most two decades; it happens increasingly often, and although we can identify the most likely originator of the practice it now pervades the whole Court; it is being used for an increasing number of the Court's most objectively important decisions; it is "built in" to the judgment-assignment process; and it is part of a package of changes that takes us toward a more institutional and less individualized (a "de-heroized") vision of the Court. The following pages will vindicate these claims.

II. *The modest (apparent) beginnings: the Dickson Court*

There were four co-authored decisions delivered by the Dickson Court, two of which involved a panel which included the Chief Justice. Those four decisions were:

- ***John v. The Queen,*** **[1985] 1 SCR 476 (per Estey & Lamer)**
- ***Labrosse v.*** *The Queen,* [1987] 1 SCR 310 (per McIntyre, Lamer & La Forest)
- ***Irwin Toy Ltd v. Quebec (Attorney General),*** **[1989] 1 SCR 927 (per Dickson, Lamer & Wilson)**
- ***R v. Sparrow*** **[1990] 1 SCR 1075 (per Dickson & La Forest)**

At first glance, this looks like a convincing if modest beginning to an emerging practice. It starts tentatively, with two comparatively minor decisions—both are very short decisions by minimum-size panels, and neither has ever been subsequently cited by the Supreme Court. The second half of the short list is much more impressive. *Irwin Toy* is still the definitive first statement of the meaning of freedom of expression under the Charter, and *R v. Sparrow* provided a comparable first statement of the Court's approach to the meaning of section 35 of the Constitution Act 1982 guaranteeing Aboriginal rights.

A closer look erodes this appearance. *Labrosse v. The Queen* looks instead like a failed attempt at a brief "By the Court" decision. On a five-judge panel reduced to four by the death of Chouinard, three judges

dismiss the appeal in about three hundred words, while the fourth (Beetz) contributes a terse single sentence agreeing with the conclusion of his colleagues; this seems to me to carry overtones of "agree with the outcome but not with the reasons" because otherwise there seems no point to the self-separation. Because of the combined effect of the poor health of a number of its members and an unusually steady turnover of personnel, the Dickson Court had atypical problems maintaining its normal routine ("panel of four" is already problematic), and this decision seems less to signal "new practice" than "somewhat frantic makeshift."

The same seems to be true of the considerably more significant decision in *Irwin Toy*. The seven-judge panel had been reduced to five by the retirement of Estey and the medical incapacitation of Le Dain, and the five-judge panel split between a three-judge majority and a much shorter two-judge (Beetz and McIntyre) dissent. But the initial appearance of a sharp division on the Court over the meaning of an important Charter section is misleading; the dissenters have no problem with the content of this robust judicial statement about freedom of expression. Their disagreement instead is about whether the Quebec legislation that violates that right can be saved by invoking section 1's "reasonable limits," and they differ from the majority by holding that it cannot. That is to say: this case as well has the appearance of a unanimous "By the Court" decision that went sideways at the last moment, but under considerable time pressure (oral argument having taken place eighteen months earlier). Once again, then, this looks less like "new practice" than "convenient makeshift."

Sparrow finally looks like a more convincing candidate, a unanimous decision of a seven-judge panel (reduced to six by the retirement of McIntyre) attributed to the Chief Justice and La Forest. However, Dickson's biographers present a different back story.[13] They report that at the judicial conference, La Forest was assigned the writing of the judgment, but his initial draft was received with serious reservations, especially by the Chief Justice and Justice Wilson. Sharpe and Roach describe Dickson as "fashioning the judgment" so as to bridge the gap between La Forest's restrained deference and Wilson's considerably more robust approach. La Forest acquiesced in the redrafting, and some elements of the reasons reflected his more cautious approach. Although Wilson reportedly believed the judgment should have gone out under Dickson's name alone,

13. Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003) at 448-543 [Sharpe & Roach].

the courtesy of joint attribution was adopted. Again, this makes it difficult to see this case as a deliberate start to a new practice.

What we are left with is the single anomalous minor case of *John v. The Queen*, a single co-authored concurrence in *Germain v. R*,[14] and a single co-authored dissent in *R v. Green*.[15] This is not much of a start to a possible new decision-making protocol.

III. *The first (real) emergence: the Lamer Court*

The Lamer Court is a more convincing candidate for initiating the new practice, with 25 co-authored judgments in ten years. There were two early examples. The first was *BG Checo*[16] in January of 1993, dealing with the tort of negligent representation; the majority decision was delivered by La Forest and McLachlin. The second, fourteen months later, was *RJR-Macdonald*[17] dealing with the question of the process and standards for an application for interlocutory relief (as distinct from the Charter challenge to regulatory legislation that would be dealt with separately and later); the unanimous decision was co-authored by Sopinka and Cory. Both were decisions of above average length, and both have been cited more than a dozen times, refuting in advance any suggestion that the co-authorship reflects a decision that is deemed minor or routine. More noteworthy perhaps are the four co-authored decisions by Sopinka and Iacobucci in 1995, three of which were companion cases[18] handed down on April 13, 1995 dealing with the right to silence and the question of compelled testimony.[19] The fourth, in November 1995, was *Khela*,[20] again a majority decision by Sopinka and Iacobucci, dealing with the Charter issue of Crown disclosure. There was a single co-authored decision in 1996, namely *Hawkins*[21] where a majority decision by Lamer and Iacobucci dealt again with the question of witness compellability. Then a pair of co-authored decisions in 1997: *Curragh*,[22] a majority decision by La Forest and Cory involving the apprehension of bias on the part of a trial judge;

14. *Germain v The Queen*, [1985] 2 SCR 241 (per Dickson & Lamer).
15. *R v Green*, [1988] 1 SCR 228 (per Estey & Lamer).
16. *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12.
17. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.
18. That is to say: cases dealing with similar or overlapping issues, assigned to the same panel of judges, with oral argument on the same or sequential days, with judgments delivered on the same day, and typically with parallel sets of judgments and minority reasons authored by the same individuals; they are often cross-referenced in the text of the decision.
19. *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3; *R v Primeau*, [1995] 2 SCR 60; and *R v Jobin* [1995] 2 SCR 78.
20. *R v Khela*, [1995] 4 SCR 201.
21. *R v Hawkins*, [1996] 3 SCR 1043.
22. *R v Curragh Inc*, [1997] 1 SCR 357.

and *Dynar*,[23] a majority decision by Cory and Iacobucci in an extradition case. This latter is noteworthy as the first example of a Cory-and-Iacobucci co-authorship, a partnership that for several years dominated the emerging practice. Several of these co-authored decisions have been of lasting significance; for example, there was *Vriend*[24] on sexual orientation and the Charter, *Gladue*[25] on sentencing principles for First Nations, *Corbiere*[26] on equality rights, and *M v. H*[27] on the rights of same sex couples under the Charter.

But this description risks begging the "new practice" question: these sporadic examples are interesting, but even as they very gradually accumulate they are too scattered to constitute anything that can realistically be described as a "practice." The important transition only comes about in 1998, with no fewer than ten examples in that year (more than the total over the previous seven years), and six in 1999. Co-authorship is therefore not a regular feature of the Lamer Court, but rather a practice that emerged only in the closing years of that Chief Justiceship.

One might have thought that Sopinka's participation as the senior member in five of the first six examples of co-authorship marked him as a significant player in the emergence of the practice, but in fact that blossoming of co-authored reasons at the end of the Lamer Court happened only after Sopinka's death in late 1997. The two individuals who can be singled out as being at the centre of the development were Iacobucci (with 16 co-authorships) and Cory (with 10). There were only five co-authored decisions for the Lamer Court that did not include either Cory or Iacobucci, a number which is smaller than the six that these two wrote together. Seven other judges were also involved to some degree, most notably McLachlin (6 co-authorships), Bastarache (also 6) and Sopinka (5).

Only five of the Lamer Court co-authorships were unanimous decisions, but this was not as noteworthy for the more fragmented Lamer Court as it would have been for the McLachlin Court. In terms of subject matter, twelve of the 25 were constitutional cases (11 Charter, one federalism), three were public law, and the remainder was evenly divided between criminal and private law cases. Many were of substantial length; 13 were 10,000 words or more, and half of those were over 20,000 words. It is the packing of this new style of judgment-delivery at the end of the Chief

23. *United States of America v Dynar*, [1997] 2 SCR 462.
24. *Vriend v Alberta*, [1998] 1 SCR 493.
25. *R v Gladue*, [1999] 1 SCR 688.
26. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.
27. *M v H*, [1999] 2 SCR 3.

Justiceship that justifies talking about the emergence of a new practice, and it is the McLachlin Court that delivers on this new expectation.

IV. *The fruition: the McLachlin Court*

I have suggested that Cory and Iacobucci were at the core of the flurry of co-authored decisions in the last two years of the Lamer Court; but Cory reached retirement age six months before Lamer retired as Chief Justice, which opened at least the possibility that the flurry would be self-contained. The truth was quite different—the practice of co-authorship did not falter, but continued at a sustained level, even after Iacobucci himself left the Court in the middle of 2004. As of 31 July 2017 (when data collection for this paper ended), the McLachlin Court had delivered no fewer than 121 co-authored decisions. This amounts to about seven such decisions a year; this seems slightly below the numbers for 1998/9, but because the Lamer Court averaged 75 reserved judgments a year and the McLachlin Court only 60, the more accurate observation is that co-authorship has been consistently higher in proportional terms for the McLachlin Chief Justiceship than for even the closing years of its predecessor.

Because the ten dozen decisions are an awkwardly large total, and because the extended length of the McLachlin Chief Justiceship makes it problematic to treat them as a single block, I will divide my description of this evolution into three different periods: early, middle and late. But because my periodization is derived from the practice itself, rather than by the arbitrary creation of strictly equal sub-periods, I will label each period in terms of the most significant co-authoring individuals as the Iacobucci period, the McLachlin/LeBel period, and the Wagner period.

V. *The Iacobucci period (2000–2004)*

Iacobucci has already been identified as a significant player in the emergence of the practice of co-authorship. This combined with his continuing high profile in the practice justifies suggesting a first period that is defined by his own service on the Court, ending with his retirement in 2004. There were 37 co-authored decisions over these five years, or about 7.5 a year; the only real low point was the initial year of 2000, when there were only two such decisions; the peak year was 2002 with 11.

Case	Citation	Co-authors
Arsenault-Cameron v PEI	2000 SCC 1	Major & Bastarache
Martel Building Corp. v Canada	2000 SCC 60	Iacobucci & Major
Spire Freezers v Canada	2001 SCC 11	Iacobucci & Bastarache
Backman v Canada	2001 SCC 10	Iacobucci & Bastarache
Trinity Western U. v B.C.	2001 SCC 31	Iacobucci & Bastarache
Proulx v Quebec (AG)	2001 SCC 66	Iacobucci & Binnie
Cooper v Hobart	2001 SCC 79	McLachlin & Major
Edwards v Law Society	2001 SCC 80	McLachlin & Major
R v Golden	2001 SCC 83	Iacobucci & Arbour
RWDSU v Pepsi-Cola	2002 SCC 8	McLachlin & LeBel
R v Cinous	2002 SCC 29	McLachlin & Bastarache
Housen v Nikolaisen	2002 SCC 33	Iacobucci & Major
Stewart v Canada	2002 SCC 46	Iacobucci & Bastarache
Walls v Canada	2002 SCC 47	Iacobucci & Bastarache
CIBC Mortgage v Vasquez	2002 SCC 60	L'Heureux-Dube & Gonthier
Krieger v Law Society	2002 SCC 65	Iacobucci & Major
B v Ontario HRC	2002 SCC 66	Iacobucci & Bastarache
R v Jarvis	2002 SCC 73	Iacobucci & Major
R v Ling	2002 SCC 74	Iacobucci & Major
Prud'homme v Prud'homme	2002 SCC 85	L'Heureux-Dube & LeBel
Miglin v Miglin	2003 SCC 24	Bastarache & Arbour
Bell Canada v CTEA	2003 SCC 36	McLachlin & Bastarache
R v Edgar	2003 SCC 47	Iacobucci & Arbour
R v Smith	2003 SCC 48	Iacobucci & Arbour
R v Johnson	2003 SCC 46	Iacobucci & Arbour
R v Kelly	2003 SCC 50	Iacobucci & Arbour
R v Mitchell	2003 SCC 49	Iacobucci & Arbour
Doucet-Boudreau v NS	2003 SCC 62	Iacobucci & Arbour
R v Clay	2003 SCC 75	Gonthier & Binnie
R v Malmo-Levine	2003 SCC 74	Gonthier & Binnie
R v Lyttle	2004 SCC 5	Major & Fish
Monsanto v Schmeiser	2004 SCC 34	McLachlin & Fish
Re Vancouver Sun	2004 SCC 43	Iacobucci & Arbour
Re Application	2004 SCC 42	Iacobucci & Arbour
R v Demers	2004 SCC 46	Iacobucci & Bastarache
Cabiakman v Industrial Alliance	2004 SCC 55	LeBel & Fish
Peoples Department Stores	2004 SCC 68	Major & Deschamps

Iacobucci clearly remains the center of the phenomenon, personally participating in 22 of the 37 co-authored decisions, about 60%. Arguably, the four most significant co-authored decisions were *Proulx* (on civil liability for malicious prosecution), *Housen* (on standards of review), *Doucet-Boudreau* (on Charter remedies) and *Malmo-Levine* (on fundamental justice in section 7 of the Charter); the first three of these involved Iacobucci. There was also a visible "second tier" of participating justices (Major, Bastarache and Arbour, all with 10), but there was no "non-Iacobucci" partnership that occurred with any frequency.

The center of gravity of the practice was Charter cases, of which there were a full dozen; there were also eight public law, and eight private law cases. The low number was for criminal cases, of which there were only six, and five of those were a single set of companion cases by Iacobucci and Arbour in 2003.

What is striking is the relative absence of Quebec judges. On the basis of simple probabilities, for any set of nine individuals divided into subsets of six and three, there are 36 different pairs that can be generated (conveniently close to the actual number of 37 for this period), and three of these will involve only individuals from the small set. This precisely predicts the actual set of three co-authored decisions by a pair of Quebec judges, which were also the only three judgments that were written in French and then translated into English rather than the reverse. However, this aside, the Quebec judges were not among the more active participants, the five Quebec judges (Lebel from the start, then Deschamps and Fish replacing Gonthier and L'Heureux-Dube) together accounting for less than one-sixth of the total (that is, 12 of the 74 participants for the 37 co-authored decisions).

VI. *The McLachlin/LeBel period (2004–2012)*

I have identified the emergence of the practice of co-authorship with the role of Iacobucci; the important question is therefore what impact his departure from the Court in late 2004 would have on that practice. The surprising answer is: less than might have been expected. The frequency of co-authored decisions is down somewhat (41 in the eight years, or just over five a year, down by a third from the first four years), but the frequency is still such that we can think of a nascent practice rather than sporadic curiosities.

Case	Citation	Co-authors
Canada Trustco v Canada	2005 SCC 54	McLachlin & Major
Mathew v Canada	2005 SCC 55	McLachlin & Major
Montreal v 2952-1366 Quebec	2005 SCC 62	McLachlin & Deschamps
May v Ferndale Institution	2005 SCC 82	LeBel & Fish
Canada HRC v CAI Ltd	2006 SCC 1	LeBel & Abella
Young v Bella	2006 SCC 3	McLachlin & Binnie
R v Gagnon	2006 SCC 17	Bastarache & Abella
Fidler v Sun Life Assurance	2006 SCC 30	McLachlin & Abella
Roberston v Thomson Corp	2006 SCC 43	LeBel & Fish
R v Morris	2006 SCC 59	Deschamps & Abella
Little Sisters v Canada	2007 SCC 2	Bastarache & LeBel
Double N Earthmoves	2007 SCC 3	Abella & Rothstein
Canada v Hislop	2007 SCC 10	LeBel & Rothstein
Canadian Western Bank	2007 SCC 22	Binnie & LeBel
BC v Lafarge Canada	2007 SCC 23	Binnie & LeBel
Health Services & Support	2007 SCC 27	McLachlin & LeBel
ABB Inc v Domtar Inc	2007 SCC 50	LeBel & Deschamps
Dunsmuir v NB	2008 SCC 9	Bastarache & LeBel
Charkaoui v Canada	2008 SCC 38	LeBel & Fish
R v Kapp	2008 SCC 41	McLachlin & Abella
Redeemer Foundation	2008 SCC 46	McLachlin & LeBel
R v Illes	2008 SCC 57	LeBel & Fish
St Lawrence Cement	2008 SCC 64	LeBel & Deschamps
R v Suberu	2009 SCC 33	McLachlin & Charron
R v Grant	2009 SCC 32	McLachlin & Charron
R v Shepherd	2009 SCC 35	McLachlin & Charron
R v Hurley	2010 SCC 18	Rothstein & Cromwell
Criminal Lawyers Assoc.	2010 SCC 23	McLachlin & Abella
R v Sinclair	2010 SCC 35	McLachlin & Charron
R v Willier	2010 SCC 37	McLachlin & Charron
R v McCrimmon	2010 SCC 36	McLachlin & Charron
Withler v Canada	2011 SCC 12	McLachlin & Abella
Ontario v Fraser	2011 SCC 20	McLachlin & LeBel
R v Katigbak	2011 SCC 48	McLachlin & Charron
Canada HRC v Canada A-G	2011 SCC 53	LeBel & Cromwell
RP v RC	2-11 SCC 65	Abella & Rothstein
LMP v LS	2011 SCC 64	Abella & Rothstein
Richard v Time Inc	2012 SCC 8	LeBel & Cromwell

R v Tse	2012 SCC 16	Moldaver & Karakatsanis
Entertainment Software Assoc	2012 SCC 34	Abella & Moldaver
Opitz v Wrzesnewskyj	2012 SCC 35	Rothstein & Moldaver

The two most frequent participants are now McLachlin (18 examples) and LeBel (16), closely followed by Abella with 11. Where Iacobucci was involved in 60% of the co-authorships for 2000–2004, McLachlin and LeBel were each involved in only about 40% of the co-authorships for 2005–2012, which is to say that the practice is now spread among a wider set of the justices, to such an extent that every member of the Court was involved at least once. There were only two co-authorships that paired McLachlin and LeBel, which means that although (at least) one of them took part in fully three-quarters of the co-authorships, they did so on an "either/or" basis rather than together. The involvement of Quebec judges was significantly higher. They accounted for 30% of the total (that is to say, 24 of the 82 participants for the 41 co-authored decisions); six of those decisions were delivered by a pair of Quebec judges, and four of those were initially written in French. However, this was almost entirely due to LeBel, who alone accounted for two-thirds of this increasing Quebec role.

The centre of gravity of co-authored decisions was still constitutional law—fourteen Charter cases, and three others on constitutional law including one (*Morris*) on Aboriginal rights. The most significant of this string of decisions are arguably *Dunsmuir* (on standards of review), *Canadian Western* (on the federal/provincial division of powers), the sequential decisions in *Kapp* and *Withler* (on the basic framework for assessing equality claims under the Charter), and *BC Health Services* and *Fraser* (part of the string of cases dealing with freedom of association under the Charter). All of these involved either CJ McLachlin or LeBel, and two (*BC Health* and *Fraser*) involved both.

VII. *The Wagner period (2013–2017)*

The use of co-authored decisions has more recently shifted upward in a pronounced way, and the appointment of Justice Wagner has been a significant element in this shift. With 43 examples in four and a half years, co-authorships now account for an average of ten decisions a year, and this at a time when the Court hands an average of about 60 reserved judgments a year. Just as much to the point, the number of these decisions is not "steady state" but clearly increasing year by year. It is also striking that within the last year there have also been a number of three-judge co-authorships, rather than the two-judge pairings that have been the case until then.

Case	Citation	Co-authors
R v Ryan	2013 SCC 3	LeBel & Cromwell
Manitoba Metis Federation	2013 SCC 14	McLachlin & Karakatsanis
Ediger v Johnston	2013 SCC 18	Rothstein & Moldaver
Penner v Niagara Regional Police	2013 SCC 19	Cromwell & Karakatsanis
Ezokola v Canada	2013 SCC 40	LeBel & Fish
Marine Services International	2013 SCC 44	LeBel & Karakatsanis
Infineon Technologies	2013 SCC 59	LeBel & Wagner
Alberta v UFCW	2013 SCC 62	Abella & Cromwell
R v McRae	2013 SCC 68	Cromwell & Karakatsanis
Vivendi Canada Inc	2014 SCC 1	LeBel & Wagner
Bernard v Canada	2014 SCC 13	Abella & Cromwell
R v Hutchinson	2014 SCC 19	McLachlin & Cromwell
Ontario v Ontario	2014 SCC 31	Cromwell & Wagner
Canada v Confederation	2014 SCC 49	LeBel & Wagner
Marcotte v Federation	2014 SCC 57	Rothstein & Wagner
Bank of Montreal v Marcotte	2014 SCC 55	Rothstein & Wagner
Amex Bank v Adams	2014 SCC 56	Rothstein & Wagner
R v Conception	2014 SCC 60	Rothstein & Cromwell
Imperial Oil v Jacques	2014 SCC 66	LeBel & Wagner
Meredith v Canada	2015 SCC 2	McLachlin & LeBel
Mounted Police Assn	2015 SCC 1	McLachlin & LeBel
Quebec v Canada	2015 SCC 14	Cromwell & Karakatsanis
Hinse v Canada	2015 SCC 35	Wagner & Gaston
Quebec v Bombardier	2015 SCC 39	Wagner & Cote
Guindon v Canada	2015 SCC 41	Rothstein & Cromwell
Caron v Alberta	2015 SCC 56	Cromwell & Karakatsanis
Saskatchewan v Lemare Lake	2015 SCC 53	Abella & Gascon
World Bank Group v Wallace	2016 SCC 15	Moldaver & Cote
Heritage Capital Corp	2016 SCC 19	Gascon & Cote
Canada v Chambre des notaires	2016 SCC 20	Wagner & Gascon
Canada v Thompson	2016 SCC 21	Wagner & Gascon
Rogers Communications Inc	2016 SCC 23	Wagner & Cote
R v Williamson	2016 SCC 28	Moldaver, Karakatsanis & Brown
R v Jordan	2016 SCC 27	Moldaver, Karakatsanis & Brown
Lafortune v Financiere agricole	2016 SCC 35	Wagner & Gascon
Ferme Vi-Ber v Financiere agricole	2016 SCC 34	Wagner & Gascon
Conference des juges de paix	2016 SCC 39	Karakatsanis, Wagner & Cote
Morasse v Nadeau-Dubois	2016 SCC 44	Abella & Gascon

Douez v Facebook Inc	2107 SCC 33	Karakatsanis, Wagner & Gascon
Clyde River v PG-S Inc	2017 SCC 40	Karakatsanis & Brown
Chippewas v Enbridge	2017 SCC 41	Karakatsanis & Brown
Quebec v Guerin	2017 SCC 42	Wagner & Gascon
Uniprix v Gestion Gosselin	2017 SCC 43	Wagner & Gascon

The focus of the cases was primarily on constitutional cases with a total of 16 (nine of which were Charter cases). There were ten decisions involving public law and 13 on private law matters, but only four for the criminal law decisions that make up a substantial share of the total caseload. Arguably, the more significant cases included *Lemare Lake* (on paramountcy in relation to the federal/provincial division of powers), *Mounted Police* (on freedom of association), *Jordan* (on the Charter right to trial within a reasonable time) and *Clyde River* (on Aboriginal rights and the "duty to consult").

The most active member of the Court in terms of co-authorship was Wagner with a total of eighteen; he was followed by Karakatsanis (with 12), Cromwell (11) and Gascon (10). The only member of the Court who had not been part of a co-authorship during the period described is the most recent appointee, Rowe, although he has co-authored a separate concurrence[28] and a dissent;[29] more recently, outside the data-collection period, he has also co-authored a decision.[30] It is also worth noting that although the Chief Justice was the most frequent participant in co-authorships between 2005 and 2012, this is definitely not true of the next five years where her four co-authorships are already matched by Justice Brown, who was only appointed two years ago.

The Wagner period is characterized by a modest but significant tilting toward the Quebec judges, with the one-third of the judges from Quebec accounting for one-half of all co-authorship partnerships. Sixteen decisions involved co-authorships by a pair of Quebec judges, and ten were initially written in French. This represents a steady and significant evolution of the practice in terms of the balance between Quebec and non-Quebec judges. Initially, during the Iacobucci period, the participation of Quebec judges was very limited, barely half of what their notional share of the Court's membership would have suggested. During the McLachlin/LeBel period, Quebec judges were 33% of the membership and 30% of the co-authorship partnerships, although much of this was due to a single judge, namely

28. *Google Inc v Equustek Solutions Inc,* 2017 SCC 34, [2017] 1 SCR 824.
29. *Guerin*, *supra* note 4.
30. *Canada (Attorney General) v Fontaine*, 2017 SCC 47 [2017] 2 SCR 205.

LeBel. But during the Wagner period, Quebec judges are one-third of the Court but one-half of the partnerships, and although Wagner is the leading actor in this respect he accounts for well under half of all the Quebec judge participation. Concomitantly, the share of co-authored decisions written in French is up from one in ten for both the earlier periods to one in four for the Wagner period.

VIII. *Assessing frequencies*

The most obvious way to assess the frequency of co-authored decisions over time is, of course, simply to count the number of such decisions a year, which is much what I have been doing in the previous section. But this is potentially misleading, because the number of reserved judgments varies considerably, not just from the ten year average of 75 a year for the Lamer Court to the 60 a year for the McLachlin Court, but from year to year within a Chief Justiceship. For the McLachlin Court, for example, the highest number of reserved judgments handed down was 76 in 2001; the lowest was 42 in 2016. The longer-term decline between the Lamer and McLachlin Courts may well reflect broader structural changes that deserve attention; the year to year fluctuations clearly do not, because they can depend on the complexity of the actual cases being dealt with, and on the availability of the justices which can be affected either by poor health or by new appointments with the implication of a transitional period.

In order to correct for this variability, I suggest flipping the perspective from which to examine the co-authorship phenomenon. Rather than counting cases from the outside, I will count panel appearances from the inside. Specifically, the reserved judgments for any given year can be recalculated in terms of panel appearances (excluding those flagged in the *Supreme Court Reports* as "Did Not Participate"); so the 76 reserved judgments in 2001 involved a total of 592 panel appearances, the 42 reserved judgments in 2016 only 339.

Every panel appearance can then be coded as resulting in one of six possible choices, three each down two different tracks. If the judge in question is part of the majority they could write solo reasons (subject of course to "circulate and revise"), or they could co-author reasons with one or more colleagues,[31] or they could sign on to reasons that are attributed to another judge or judges. Similarly, if the judge is involved in a dissent or

31. For immediate purposes, I am treating participation in a "By the Court" judgment—of which there were a number—as a form of co-authorship, although my immediate attention is on the two- or three-judge variety of those collaborations. For a consideration of the history and evolution of the "By the Court" phenomenon, see Peter McCormick, "'By the Court': The Untold Story of a Canadian Judicial Innovation" (2016) 53:3 Osgoode Hall LJ.

a separate concurrence, they can either solo-write these minority reasons (which may or may not be joined by one or more colleagues), or they can co-author those reasons, or they can sign on to the minority reasons attributed to another judge or judges. For present purposes, it is the first two of these six that I will consider: if you were a judge on the McLachlin Court, approaching a case for which you had been assigned to the panel, what is the likelihood that you would be part of the judgment-writing conclusion of the Court's consideration of the case, and what is the relative likelihood of that participation being solo or shared?

Figure 1. Likelihood of Panel Participation Resulting in Authorship, by year

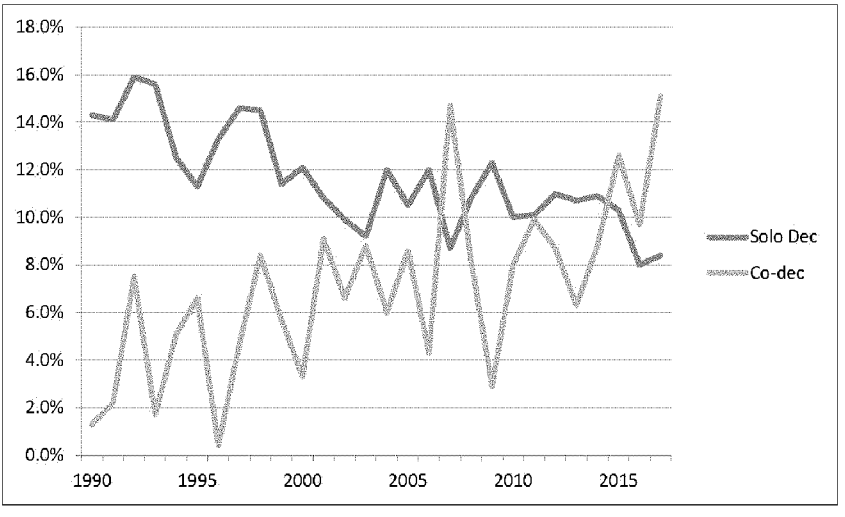
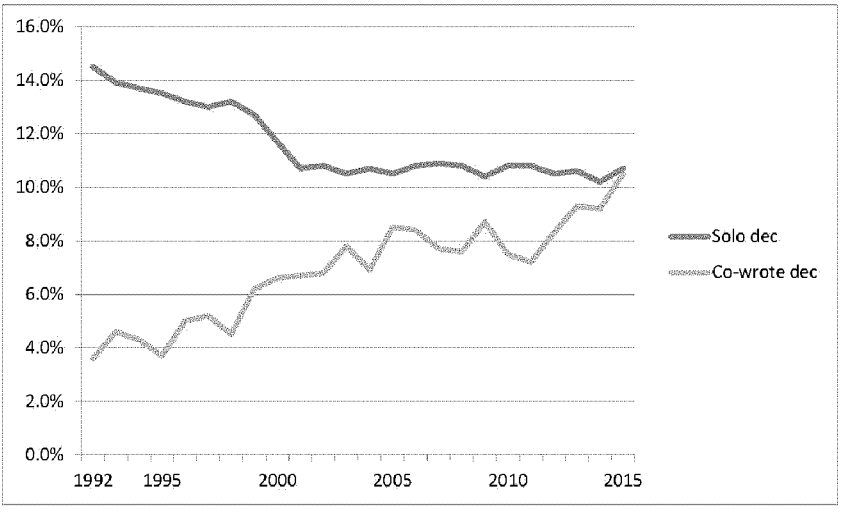


Figure 2: By five-year running averages



The year to year fluctuations are considerable, but do not obscure the gradual closing of what started as a very wide gap. What initially drives the "solo decision" line, of course, is the panel size, which has gradually been tracking upward for the last thirty years, but that should only bring it down to about 12% (the average panel size for the McLachlin Court hovering around 8), and it has been below that number for almost all of the last 20 years. But, because the year-by-year fluctuations have been considerable, the numbers have been recalculated on the basis of five year running averages in the next figure (which therefore has to drop the first and last pair of years from the chart).

The running-averages chart conveys the same message in even clearer terms: in terms of "what is this panel appearance going to result in?" calculations for the average Supreme Court justice, it is increasingly likely that the result will be a co-authorship rather than a solo authorship, to such an extent that the two lines converge for the most recent terms. In tabular form:

	Years	Solo Decision	Co-decision	Ratio
Lamer 1	1990–1994	14.5%	3.6%	25%
Lamer 2	1995–1999	13.0%	5.2%	40%
Iacobucci Period	2000–2004	10.8%	6.8%	60%
McLachlin/LeBel Period	2005–2012	10.7%	8.2%	75%
Wagner Period	2013–2017	9.7%	10.5%	110%

Thirty years ago, at the beginning of the Lamer Court, there was some co-authorship (at least in the form of anonymous-unanimous 'By the Court' decisions), but it was only a modest part of the Court's business; even with the "everyone shares" element of 'By the Court,' it was still four times as likely that a panel participation would result in a solo judgment assignment than that it would result in co-authorship. By the end of the Lamer Court, the balance had begun to shift slightly, but it was still two and a half times as likely that a panel participant would be solo-writing reasons. The swing continued and accelerated during the McLachlin Chief Justiceship. During what I have termed as "the Iacobucci period," the solo assignment of a judgment was only half again as likely as a co-authorship, and during the McLachlin/LeBel period, it was only a third again as likely. Most dramatically, since (although not necessarily because of) the appointment of Justice Wagner, it is slightly more likely that a panel appearance by any justice will result in a co-authorship than that it will result in a solo authorship. From the outside point of view of counting specific cases, this is double (or triple, or in the case of By the Court judgments multiple)

counting some cases, but from the inside point of view of a participating judge, this is what the active caseload now looks like. Co-authorships are no longer an occasional curiosity; they have become such a regular part of what the Court does that both judges and outside observers must change their thinking about what judicial participation looks like. Indeed, this is already starting to happen. When the *Lawyers Daily* publishes its summary annual evaluation of each of the judges on the Supreme Court, they do so by identifying both the solo judgments and the co-authored judgments of each justice on something of an equal basis.[32] This is something that we have to get used to, with the consequences that I will consider in a later section.

IX. *Major cases or minor cases?*

The critical question, of course, is whether there is a pattern to the use of co-authorship, and if so whether that pattern steers it toward the less or the more important side of the caseload. In the previous section, I have pointed out some of the more important cases, but this is an impressionistic rather than a systematic approach, and therefore no more than a first indication. How is one to objectively operationalize the idea of "more important" in terms of the Supreme Court caseload? I propose several different approaches, playing up different aspects or dimensions of decision importance.

The *first dimension* is *subject matter*—that is to say, the type of law that is being addressed by the case in question. The Supreme Court keeps track of its cases as being divided into two different categories, criminal and civil, but this seems too blunt a division for present purposes. My own preference is for a four-category division of cases—constitutional law, public law, private law and criminal law—which has the added convenience of creating four roughly equal segments of the reserved judgment caseload. Reflecting my own research and teaching interests as a political scientist who teaches courses on constitutional law, I would suggest that this four-way division above is also in some respects an order of importance in terms of the impact of the cases within each set. The table indicates the number of reserved judgments for each of these four sets of decisions, divided in terms of whether they were "By the Court," "joint judgment" or "solo judgment" decisions.

32. See, e.g., "Karakatsanis played a major role for the court" (16 February 2017) *The Lawyer's Daily* (Lexis), online: <www.thelawyersdaily.ca/articles/3347>.

Type of law	BTC	joint	solo	Total	BTC%	Joint%	Solo%
Constitutional	21	48	204	273	7.7%	17.6%	74.7%
Public	11	27	178	216	5.1%	12.5%	82.4%
Private	7	31	252	290	2.4%	10.7%	86.9%
Criminal	17	15	253	285	6.0%	5.3%	88.8%
Total	56	121	887	1064	5.3%	11.4%	83.4%

Constitutional law cases are clearly the most likely to draw either joint or "By the Court" decisions, half again as much as for the caseload as a whole, such that fully one quarter of all constitutional law cases no longer reflect the solo-judge authorship style that until recently was the Supreme Court's norm. Public law cases are also slightly more likely than average to involve a form of joint authorship, but private law cases are less likely, and criminal cases much less likely, to do so. In terms of type of law, then, the joint decision caseload is clearly and strongly tilted toward the more important cases.

Constitutional law in this century is of course something of a three-ring circus, the three being Charter law, federalism/division of powers cases, and First Nations law. Does this differentiation point to differing likelihoods of joint decisions?

Type	BTC	joint	solo	Total	BTC%	Joint%	Solo%
Charter	13	36	149	198	6.6%	18.2%	75.3%
Federalism	6	8	35	49	12.2%	16.3%	71.4%
First Nations	2	4	20	26	7.7%	15.4%	76.9%
Total	21	48	204	273	7.7%	17.6%	74.7%

As the table shows, the use of By the Court decisions, which are also more common for constitutional law cases than for other types of law, is clearly tilted toward the constitutional law of federalism, where it is almost twice as likely as for other types of constitutional cases. But co-authored decisions are relatively evenly spread across all three types of constitutional law, to the point that we can (almost) say "plus or minus 1%" to describe the frequency for constitutional law generally and for each of these three sub-fields.

The *second dimension* of case importance is *legal complexity*. Some Supreme Court cases involve dealing with less-than-fully settled aspects of the law, such that there is genuine uncertainty as to the optimal resolution of the core legal issue and, correspondingly, differences among the various judges who have addressed it. In a very theoretical sense, the most desirable situation for a court system would be for all judges who look at

a case to arrive at the same outcome, and this is what normally happens in the Canadian judicial system: most trial decisions are not appealed, most appeals are dismissed, and most appeal panel decisions are unanimous. But if this is so, then it justifies looking more closely at those occasions when one or more of these theoretically desirable circumstances did not occur.

A Supreme Court decision is normally the third take on a particular case, after an initial trial court decision and a further consideration by a provincial or federal court of appeal. There are therefore four different opportunities for this uncertainty to display itself.

- **First, the court of appeal may allow the appeal; Hettinger et al[33] refer to this as "vertical dissent" dividing different levels of courts just as "horizontal dissent" divides the panel of a particular appeal court.**
- **Second, the court of appeal may be divided in its decision.**
- **Third, the Supreme Court may allow the appeal from the court of appeal.**
- **Fourth, the Supreme Court itself may be divided in its decisions.**

This suggests a "complexity index" of four elements, each one of which can be scored as a "0" or a "1," giving the index itself a range from zero to four. At one extreme, a "0" is a case where unanimous panels of the court of appeal and the Supreme Court itself dismissed the appeal and upheld the trial court decision. This suggests a case of relatively low complexity, operating against a background of such reasonably settled law that all thirteen of the judges (one trial judge, three provincial or federal court of appeal judges, nine Supreme Court justices) could agree on the legal principles and their application. At the other extreme, a "4," we have a case where both appeals were successful but neither succeeded in such a way as to unite the panel, which suggests a considerable degree of uncertainty as to the law and its application. There are also a number of cases (coded below as "other") that do not involve this multi-stage appellate journey, a combination of federal or provincial reference questions on the one hand and *per saltum* appeals direct from a provincial superior trial court on the other.

Complexity	BTC	Joint	Solo	Total	BTC%	Joint%	Solo%
0	11	11	9	119	9.2%	9.32%	81.5%
1	12	37	256	305	3.9%	12.1%	83.9%
2	19	50	284	353	5.4%	14.2%	80.5%
3	6	15	192	213	2.8%	7.0%	90.1%
4	0	3	38	41	0.0%	7.3%	92.7%
Other	8	5	20	33	24.2%	15.2%	60.6%
Total	56	121	887	1064	5.3%	11.4%	83.4%

The pattern of results does not suggest that joint decisions (or their By the Court counterparts) are disproportionately tilted toward the more complex cases, but neither does it support the counter-hypothesis that the co-authorship judgment presentation mode is used for the least complex cases. The highest proportion of joint decisions is directed to the middle of the scale, dropping off on both sides.

The *third dimension* of caseload importance has to do with *public salience*, and I would suggest that a useful indicator in this regard is interveners—not simply the question of whether there are interveners or not, but how many different actors have chosen to intervene. Just over half of the Supreme Court's reserved judgments drew at least one intervener, but many of those drew only one or two interveners while at the other extreme only one case in 12 involved ten or more different interveners.

Interveners	BTC	Joint	Solo	Total	BTC%	Joint%	Solo%
None	24	34	363	421	5.7%	8.1%	86.2%
Few (1-2)	7	22	220	249	2.8%	8.8%	88.4%
Some (3-5)	7	35	144	186	3.8%	18.8%	77.4%
Several (6-9)	10	18	92	120	8.3%	15.0%	76.7%
Many (10+)	8	12	68	88	9.1%	13.6%	77.3%
Total	56	121	887	1064	5.3%	11.4%	83.4%

Again, the pattern of results does not at all support the hypothesis that joint decisions are generally directed toward the less important (in this case, less publicly salient) decisions. There is instead a strong support for the counter-hypothesis that their use is tilted toward the less routine (that is to say, more publicly salient) cases, especially if this is conceptualized less in terms of the five blocks of increasing intervener presence than a dichotomous distinction between the two-thirds of the cases with "none or few" interveners on the one hand, and the one third with three or more interveners on the other.

The *fourth dimension* of importance has to do with judicial precedent and *judicial citation*, the suggestion being that one meaning of "decision importance" would be that these are the cases that are subsequently cited more often by the Supreme Court itself. Simply counting these citations is not enough to make the point, because the playing field is not level —decisions handed down in 2000 have had more time to accumulate citations than those handed down in 2015. My solution is to rank the cases in terms of subsequent citations a year—a decision that has been cited ten times since it was handed down two and a half years before my cut-off date of June 30, 2017 has a per year citation count of 4.0, and a decision from 2000 would have to have accumulated more than five dozen citations to earn the same score. (Given that there is a steady and measurable attrition to citation frequency for any set of decisions, this methodology actually favors the more recent decisions—it is easier to achieve any "per year" frequency for the first five years than for any longer period—but the impact of this factor is reduced by the fact that the attrition rate for the McLachlin Court is much lower than it was for previous Chief Justiceships.)

Cite Rank	BTC	Joint	Solo	Total	BTC%	Joint%	Solo%
No cites	21	15	159	195	10.8%	7.7%	81.5%
.01-.5/yr	22	38	373	433	5.1%	8.8%	86.1%
.51-1/yr	5	24	197	226	2.2%	10.6%	87.2%
1.01-2/yr	3	25	107	135	2.2%	18.5%	79.3%
>2/yr	2	14	29	45	4.4%	31.1%	64.4%
Total	53	116	865	1034[33]	5.1%	11.2%	83.7%

The results are quite striking, and strongly support the hypothesis that joint authorship is directed to the portion of the caseload that is more important in terms of subsequent citation. The lowest proportion of joint decisions, one in every fourteen, is for the 20% of cases that are never cited; conversely, the proportion of joint decisions for the one-in-twenty-five cases that are cited more than twice a year is four times as great, almost one case in every three.

On three of the four suggested dimensions of decision importance, joint decisions stand out as making up a disproportionate share of the more important decisions. Legal complexity, assessed in terms of disagreement within and between the courts that considered any specific case, is the odd one out; the highest levels of complexity correlate with a lower proportion

33. Lower total because of exclusion of decisions between 1 January 2017 and 31 July 2017, none of which had accumulated any citations as of the 30 June 2017 cutoff date for the database.

of joint decisions. On the other three measures of decision importance, however, joint decisions are clearly identified with the more important cases. In terms of subject matter, joint decisions are significantly more likely for constitutional law cases than for any other cases, and within the rest of the caseload for public law cases rather than private law or criminal law cases. In terms of interveners, a measure of public salience, joint decisions are much less likely if there are none or few interveners, much more likely if there are three or more interveners. And in terms of citation importance, joint decisions are strongly over-represented in the heavily-cited lists, making up almost one third of the handful of cases that are cited more than twice a year.

The obvious conclusion is that jointly authored decisions are not only increasing in number but are also doing so for a disproportionate number of the more high-profile and significant decisions of the Supreme Court. These are not decisions that do not matter; they are decisions that matter a great deal. The diffusion of accountability for the writing of those decisions is therefore something that has to be taken into account in terms of the internal operations of the Supreme Court and the way that it is choosing to present itself to litigants and to the public.

X. *Co-authorship and the decision process*

As it appears in the *Supreme Court Reports*, a co-authorship simply involves a judgment of the Court that has been delivered by the two or (less often and only recently) the three co-authors listed in order of seniority. The protocols for handling multiple authors differ from one institution to another—for example, they vary from one discipline to another in academia, although within any discipline they are usually quite widely understood—but for judicial co-authorships, that protocol is strict seniority without any hint as to whether one of those listed may have been responsible for the early drafts or played an unusually prominent role in the revision process.

As the Supreme Court and various judges have described it, the current procedure for decision-making involves a post-hearing judicial conference at which there is a one-after-the-other exchange of views about the case they have just heard. On that basis, the general mood of the panel is determined, and an assignment is made as to who will have the responsibility of drawing up a first draft, which will then be circulated among the panel members for comment. The immediate question is how the new practice of co-authorship fits with this long-standing description of the process, and there are obviously two distinctly different possibilities.

The first possibility is that the basic practice remains unchanged, but something during the circulate-and-revise process has occasioned a shared attribution between the initial assignee and some other member of the panel. This may involve (as Justice Bastarache once suggested in a personal conversation) the possibility of a separate concurrence that would erode the majority position, suggesting the desirability of the original author and the potential defector working together to generate a mutually acceptable position. Or it may involve (as former Chief Justice McLachlin has suggested in a slightly different context) the initial author's acknowledgement of a particularly useful or important contribution.[34] Both point to what might be called an *accommodative* co-authorship, which would be a device to prevent the fragmented panels that were common for the Lamer Court and which McLachlin has sought to avoid.

The second possibility is that the initial assignment of the majority reasons can itself be to two or three judges. Nothing I have read in any of the several descriptions of this process makes any suggestion of a "two of us" assignment, but neither do they preclude it. Given the established protocol, the co-authoring judges may have volunteered as a unit, or the Chief Justice may have chosen to make the assignment that way.[35] Either way, my label for this is *incipient co-authorship*, and it represents a deliberate shift in the way the decision delivery process is approached from the beginning.

The methodology that might serve us in determining which of these processes is demonstrated in the Court's co-authorship practice is function word analysis. This proceeds from the observation that there is in the English language a basic set of function words, which is to say the pedestrian words like "the," "and," "of," "to," "or," "but," "if" and the like. Everyone uses these words, and they make up a surprising proportion of everything we write;[36] but different people use them in subtle but consistently different ways, more of one and less of another. This is an objectively accessible element of personal style that constitutes something

34. See Tonda MacCharles, "Chief Justice Beverley McLachlin ready to write new chapter with novel" *Toronto Star* (16 June 2017) [MacCharles].

35. The descriptions that Supreme Court judges have given of the process mention both volunteering and Chief Justice assignment; it is not clear what the balance is between them.

36. The 44 function words that I have been using for this analysis account for about 40% of the words used by any of the McLachlin Court judges in any of their reasonably long decisions.

of an individual textual fingerprint, and that can therefore be used to identify the actual writer of a problematic text.[37]

For present purposes, I have created a list of 44 function words, starting with Rosenthal & Yoon's list but revising in the light of actual usage from McLachlin Court decisions totaling some five million words.[38] This is used to generate a "Difference Score" that is the sum of the absolute values of the differences between an individual judge's function word usage in a broad set of single-authored judgments, and the function word usage of the immediate decision. In an earlier article, I used this methodology to identify the lead writer of many of the McLachlin Court's "By the Court" (that is, anonymous and unanimous) decisions.

Two obvious problems have been anticipated by my methodology. One is the "law clerk problem" and the somewhat sensitive issue of the extent to which these individuals contribute to the writing of decisions; this was what Bodwin, Rosenthal and Yoon were investigating in their article. My solution has been to look only at the analysis section of the decisions, on the assumption that whatever the clerks' involvement, it is less likely for that section than for the more routine elements (background, facts, lower court judgments, legislative provisions) of the reasons. A second is the "quotation problem," given that judicial decisions often involve direct quotations from the lower court decisions, from earlier decisions of their own or other courts, or from academic sources. For some judges in some decisions, these can make up as much as one quarter of the entire word-length of the decision, and for the McLachlin Court as a whole the ratio is one word in every six. To deal with this, such direct quotations were deleted before word-counts were calculated.

Unavoidably, the double reduction—analysis section only, shorn of direct quotations—leaves many of the co-authored decisions shorter than would be necessary for confident analysis. If the function word list is including words that are used only two or three or four times in a thousand, then one needs several thousand words for the judicial writing style to have the space to present itself. There were only 34 cases for which the

37. One of the earlier examples of this approach was to penetrate the Federalist Papers to identify the writer of the handful of non-attributed papers; see Frederick Mosteller & David L Wallace, *Inference and Disputed Authorship: The Federalist* (Reading, UK: Addison-Wesley, 1964). It has more recently been applied to judicial decisions by Jeffrey S Rosenthal & Albert H Yoon, "Judicial Ghostwriting: Authorship on the Supreme Court" (2011) 96:6 Cornell L Rev 1307, and by Kelly Bodwin, Jeffrey S Rosenthal & Albert H Yoon, "Opinion Writing and Authorship on the Supreme Court of Canada" (2013) 63:2 UTLJ 159.

38. For a more detailed explanation of the methodology, and a table of the list of words used for this purpose, see Peter McCormick, "*Nom de Plume*: Who Writes the Supreme Court's 'By the Court' Judgments?" (2016) 39:1 Dal LJ 77.

twice-shortened word count was more than six thousand words, and they are the only ones that will be considered in this section.

One final problem that cannot be finessed is the language in which the decision was written (and the presentation format of the Supreme Court Reports makes it clear which set of reasons reflects the initial language of writing, and which is the official translation). The methodology cannot realistically be applied to translations, which will almost certainly reflect the stylistic preferences of the translator as much as those of the initial writer. The cases that I will be considering in this section are therefore drawn from the 103 co-authored decisions that were delivered in English, not the 18 that were delivered in French.

One might wonder whether the fingerprints of initial authorship survive the "circulate and revise" process of the modern Supreme Court, but the answer to this question is an unqualified "yes." For the Dickson Court's major "By the Court" decisions in *Ford* and *Devine* Le Dain was clearly indicated as the initial author—but the *Supreme Court Reports* state that Le Dain "did not participate" in the decision. Sharpe and Roach provide the explanation: Le Dain wrote the initial draft, provoking major concerns from other judges, but was subsequently hospitalized such that he could not make the necessary extensive revisions. These were accomplished by Lamer and Wilson, and the "did not participate" entry reflects the fact that Le Dain could not sign off on the final draft.[39] That is to say: even "major revisions" by other judges did not erase Le Dain's stylistic fingerprints, still visible in function word usage.

The basic point is simple: in the case of an accommodative co-authorship, where an initial author is accepting revisions from a colleague to the extent that a co-authorship attribution becomes appropriate, the function word patterns of the final product will be measurably closer to those of the lead author than to those of the colleague. (To make the point a little differently: the concern in the accommodating revisions will be more the ideas expressed than the stylistic preferences guiding the precise words with which those ideas are expressed.) In the case of an incipient co-authorship, the collaboration has been built into the text from the earliest stages, and this will be pervasively reflected in the writing style as well. As a result, the function word patterns of the final product will reflect this deeper partnership and will not point to either of the two as having played the larger role. If the Difference Score for the co-authoring judges is sharply different (such as *Marcotte*, where the difference score is 4.3% for one of the pair, 5.9% for the other), this will be taken as indicating a

39. See Sharpe & Roach, *supra* note 13 at 427-432.

lead author and an accommodative process. Where there is effectively no difference in the score (such as *Grant*, where the score is 5.06% for one judge, 5.07% for the other), this will be taken as indicating a full incipient collaboration.

XI. *Lead authorship for co-authored judgments: the Iacobucci period*

Case	Year	Co-authors	Lead writer?
Martel	2000	Iacobucci & Major	Yes
Golden	2001	Iacobucci & Arbour	Perhaps
Cinous	2002	McLachlin & Bastarache	No
Stewart	2002	Iacobucci & Bastarache	No
Housen	2002	Iacobucci & Major	No
RWDSU v Pepsi	2002	McLachlin & LeBel	Perhaps
Jarvis	2002	Iacobucci & Major	No
Doucet	2003	Iacobucci & Arbour	Yes
Miglin	2003	Bastarache & Arbour	No
Malmo-Levine	2003	Gonthier & Binnie	No
Peoples	2004	Major & Deschamps	No
Application	2004	Iacobucci & Arbour	No
Demers	2004	Iacobucci & Bastarache	No

There were 13 co-authored decisions during the "Iacobucci Period" with a reduced word count above 6,000 words. Two had a clear lead author between the pair, and two others may have done so, but for nine of them the function word analysis strongly suggested a balanced co-authorship. Two or perhaps four were accommodative co-authorships; nine or perhaps eleven were incipient.

XII. *Lead authorship for co-authored judgments: the McLachlin/LeBel period*

Case	Year	Co-authors	Lead Writer?
Canada Trustco	2005	McLachlin & Major	No
May v Ferndale	2005	LeBel & Fish	Yes
Hislop	2007	LeBel & Rothstein	No
BC v LaFarge	2007	Binnie & LeBel	Yes
BC Health Service	2007	McLachlin & LeBel	No
Canadian Western	2007	Binnie & LeBel	No
Dunsmuir	2008	Bastarache & LeBel	No
Grant	2009	McLachlin & Charron	No
Criminal Lawyers	2010	McLachlin & Abella	Yes

Sinclair	2010	McLachlin & Charron	Yes
Withler	2011	McLachlin & Abella	Yes
Tse	2012	Moldaver & Karakatsanis	Perhaps
Opitz	2012	Rothstein & Moldaver	Yes

Similarly, there were thirteen co-authored decisions during the McLachlin/LeBel period with a reduced word count above 6,000 words. Six of them seem to have had a clear lead author, six did not, and one was uncertain—an even split, then, but one that suggests that both accommodative and incipient co-authorships were involved during these eight years.

XIII. *Lead authorship for co-authored judgments: the Wagner period*

Case	Year	Co-authors	Lead Writer?
Manitoba Metis	2013	McLachlin & Karakatsanis	No
Infineon	2013	LeBel & Wagner	Perhaps
Hutchinson	2014	McLachlin & Cromwell	No
Marcotte	2015	Rothstein & Wagner	Yes
Mounted Police	2015	McLachlin & LeBel	Perhaps
Guindon	2015	Rothstein & Cromwell	No
Caron	2015	Cromwell & Karakatsanis	Yes
Jordan	2016	Moldaver, Karakatsanis & Brown	No

There were only eight co-authored decisions in English during the Wagner period with a reduced word-count above 6,000 words. For two of them, the function word analysis strongly supported the idea that there was a lead author; for four of them, the indication was of a more balanced partnership; and for two, the results were uncertain.

	Lead Author	Uncertain	No Lead Author	Total
Iacobucci Period	2	2	9	13
McLachlin/LeBel Period	6	1	6	13
Wagner Period	2	2	4	8
Total	10	5	19	34

On balance, for the entire Chief Justiceship, more than half of them seem to have been the product of a balanced partnership—that is to say, they were incipient co-authorships with collaboration on the writing from the earliest stages. Only half as many show one of the collaborators to have had a distinct lead role. Although some co-authorships may arise from the circulate-and-revise process as a device for avoiding fragmented panels, considerably more seem to have emerged from the post-hearing conference

and the initial assignment of the responsibility for writing the majority judgment. This is the more interesting, because the more structural, of the two possibilities.

XIV. *Why co-authorship?*

I have demonstrated that co-authorship is a recent development for the Supreme Court of Canada, that it is being employed increasingly often, that it is focused on the more significant cases in the more important parts of the caseload, that it is pervasive on the Court rather than being restricted to some identifiable sub-set of its members, and that it has been integrated into the judgment assignment process itself rather than being an accommodative response to emergent differences. But this simply takes us to the more fundamental question: why co-authorship?

It is worth noting that a shift away from single to multiple authorship is a pervasive reality of contemporary academic publication. Ask any major funding agency, and they will tell you that the new reality is less the curiosity-driven single scholar than the research team or (better yet) the multi-university research network.[40] As Tom Ginsburg has pointed out in a recent article, this is true of academic legal journals as well, and I will draw on him for some ideas that might explain this trend.[41]

A first possibility is that co-authorship is a response to the challenge of expertise and specialization accompanied by intellectual attempts to establish bridging theories. An article applying economic models to the study of law will tend to be written by a team that includes at least one economist and at least one law professor; anything else risks an embarrassing gaffe and loss of credibility. There is of course an element of specialization to the practice of law—all members of the Supreme Court arrive with a solid background in a particular branch of the law—but the tendency of Canadian courts, especially appeal courts, is toward the English principle that "a judge is a judge" such that specialization is something to be contained and diffused rather than entrenched.

A second possibility is, more generally, to enhance the acceptability and status of the product: if one judge is impressive, then two or three are even more so, and each may have greater credibility for some identifiable part of the audience. This does not seem relevant to the Supreme Court,

40. In an interesting parallel: when Peter Mansbridge stepped down as the long-serving news anchor for CBC news, he was not replaced by a new individual but (with considerable fanfare) by a rotating team of four people. Although one can see pragmatic reasons for this change, it is nonetheless an interesting parallel.

41. Tom Ginsburg, "Empiricism and the Rising Incidence of Coauthorship in Law" [2011] U Ill L Rev 1785.

all the more so with its trend toward larger Full Court panels and a well-publicized "circulate and revise" procedure.

A third is the notion of a compensation for efforts. In an academic setting, this can be linked to seniority and juniority: a junior assistant professor may be willing to invest the time and effort to provide robust critical feedback to a senior colleague without expecting formal acknowledgment, but as that person becomes more established they are less likely to do so without some recognition, such as co-authorship. Curiously, something of the sort does seem to have been hinted at in McLachlin's recent interview, where the co-authorship of 'By the Court' is presented as (sometimes) having been a recognition of important critical response from one or more of the other members of the panel.[42] At some point, an after-the-fact reward gradually becomes a before-the-fact incentive. Although she was not speaking directly of the two- or three-judge shared decisions I have been looking at, it is not unreasonable to think that the same thing might help to explain some co-authorships.

A fourth possibility might somewhat crassly be suggested as "sharing the goodies" within a restricted universe of publication opportunities. In academia, of course, this is linked to the grim maxim of "publish or perish," but it also applies in some sense to the Supreme Court as well, given a caseload that has been shrinking fairly steadily for several decades. Presumably judges accept appointment to the Supreme Court with the expectation of contributing usefully to the development of the law, and writing critical suggestions for somebody else's reasons may not be a fully satisfactory way of achieving this; co-authorship expands the opportunities for such contributions to be openly acknowledged and recognized. An alternative response might well be an increase in the number of minority reasons, and I take note in this context of Bastarache's suggestion that at least some of the McLachlin Court's early co-authorships represented a successful attempt by the Chief Justice to limit the number of separate concurrences. The concern is possibly all the greater because on the Supreme Court's own account, seniority is a major element of the choice between competing volunteers for solo lead authorship.

A fifth possibility (my own, not Ginsburg's) is that co-authorship might reflect a response to the transition process. Serving on the Supreme Court can be, even for experienced provincial court of appeal judges, a significant challenge. As one judge put it to me, a provincial court of appeal judge can take comfort from the fact that the Supreme Court is there to pick up on possible errors, but the judges on the Supreme Court

42. MacCharles, *supra* note 35.

itself work without a safety net. One way to ease the transition is for a recent appointee to co-author with a more senior colleague, and 22 of the 121 co-authorships are consistent with this.

A sixth possibility is the diminution or diffusion of credit or blame. Whether or not this is the purpose of the shift to co-authorship, it is certainly a consequence of it, and I will therefore be devoting the concluding section to a consideration of its implications.

Conclusion

I would suggest that the best way to think of the rise of formal co-authorship on the Supreme Court is to think of it in terms of a gradual but deliberate and consistent move toward a less individualized and more institutional self-presentation of the Supreme Court—in a phrase, the "de-heroization" of the Supreme Court. It represents a conscious move away from a Court that is characterized by individuals who can be seen as champions who come to stand for a particular position or a particular point of view or perhaps just a particular specialization; and a corresponding move toward a more institutional view where several or many judges visibly collaborate on a fully collegial position, such that outcome trends cannot easily (or perhaps at all) be traced back to individual justices.

This has been true more generally of the way that McLachlin has handled her own Chief Justiceship. Assessing her legacy following her retirement, I have been struck by how many of the decisions that could have been her individual legacy have instead taken the form of 'By the Court' decisions or co-authorships. It is for this reason that I am treating the established practice of co-authorship as her legacy, even though its origins reach back into the Lamer Court.

Diffusing the responsibility for a set of reasons for judgment between a duo (or a trio) of judges is of course not the same thing as spreading it equally over the entire panel, but it is very much a step in the same direction—that is to say, it carries us away from an emphasis on individual reputation in favour of a less personal and more institutional form of self-presentation. If we want to assess the contribution to the law that was made by (say) former Chief Justice Brian Dickson, we would begin with a consideration of all the sets of reasons attributed to his authorship during his service on the bench. But if we want to know about the contribution to the law that was made by (say) Justice Frank Iacobucci, the parallel enquiry would be complicated by the fact that literally hundreds of citations have been made to dozens of decisions that Justice Iacobucci co-authored with half a dozen different colleagues, adding up to fully half as many citations as those to his solo-authored reasons. How much of what we see on the

page for any specific set of such reasons is Iacobucci, and how much is his co-author? How much is a joint product that is not quite the same as what either judge would have written alone, reflecting the fact that collaboration involves cooperation and constraint? My earlier investigation of co-authorship identified this diffusion of authorial responsibility as one of the problematic aspects of the practice, a consideration that becomes even stronger as two-person-authorship begins to yield to three-person-authorship.[43] It would be a mistake to think of this as only a minor aspect of current judicial citation practices; a count of judicial citations by the McLachlin Court shows that the only individual judge cited more often than "Mr. Justice two (or three) of us" is the Chief Justice herself (but not by much).[44]

The related development is the gradual disappearance of named citations from the repertoire of the Court's explanatory practices. The major weapon in the Court's persuasive arsenal is the citation of prior judicial decisions, and recent decades have seen a steady increase in the proportion of these citations that are to prior decisions of the Supreme Court itself. Sometimes these citations provide the name of the specific judge who wrote the reasons (and as noted above until recently all reasons were attributed to a single specific individual), and sometimes they do not. The Laskin Court identified the writing judge in such a way in 39.8% of its citations; the Dickson Court did so for 44.5%, and the Lamer Court for 40.5%. For the McLachlin Court, this same figure has fallen by a third, to 26.4%; even more to the point, it was 32.2% for the first five years of the McLachlin Chief Justiceship, but only 20.4% for the most recent five years. Again, it is entirely appropriate to identify McLachlin herself as a leader in this process; during the first five years of her Chief Justiceship, she named the cited judge in only 22.2% of her citations, which at the time made her a lonely outlier by a considerable margin. During the most recent five years, this proportion of named citations has dropped slightly (to 19.2%), but this now puts her in the middle of the current set of judges, which strongly suggests that the practice will survive her departure from the Court.

Not all citations, of course, are of the same type. Some quote directly from an earlier decision or discuss it at length, some simply involve pointing to a single case as support for a particular statement or proposition, and some involve an American "string style" of citation that can list half a dozen or more cases to back up an idea. The proportion of all citations that

43. McCormick, "Sharing the Spotlight," *supra* note 7.
44. Comment based on research in progress, manuscript under review.

involve direct quotation from the earlier judgment has not really changed —it was 30.1% for Lamer and 29.2% for McLachlin—but the likelihood that a direct quotation will be attributed to a specific named judge has fallen considerably. This happened 85% of the time for the Lamer Court; it now (over the last five years) has fallen to marginally less than 50% for McLachlin Court. And, compounding the point, the citation of a co-authored decision is only half as likely to include specific names than the citation of a single-authored decision, even if a direct quotation is involved.

Citations are the way that the Court links its decision in the immediate case to the Court's own past, and to a steadily increasing extent that is being done in ways that point much less often to specific individual judges (either from earlier courts or the current court) and much more often to an institutional product—"in such and such a case, the Court decided" or "in an earlier case, the Court said." To read a Supreme Court decision from twenty five or thirty years ago was something of a historical survey of the great individual names from the history of the Court—Duff and Rand and Laskin and Dickson walked side by side with Lamer and Sopinka and La Forest and Iacobucci, and almost every judicial decision directly referenced several of them by name. This is much less true of more recent decisions, and although one can look up each case one to see which historic great may have written those reasons, this is not at all the same thing. Again, the swing is from individual reputation to institutional and collective reputation, and although it may be gradual and not yet complete, it has been persistent and cumulative.

This article has identified a significant shift in the way that the Supreme Court has presented its decisions over the last two decades, and specifically in the strong trend toward co-authored rather than single-authored reasons for judgment.[45] It has demonstrated that this practice is primarily directed to constitutional decisions, that it now embraces every member of the Court rather than some particularly collegial or dominant core of it, that it involves an increasing number of the Court's most heavily cited decisions, that it has evolved from a practice primarily of non-Quebec judges to include both major segments of the Court, and that from the point of view of individual judges it has become the most common way of direct involvement in reasons for judgment. Combined with the above-described shifts in citation practices, this represents a strong shift away from the more individualized Court to which we have been accustomed and toward a more institutional approach.

45. There has also been a comparable, if slightly less pronounced, parallel shift toward co-authored rather than solo-authored minority reasons, both dissents and separate concurrences.

My use of judges' names for the three periods (Iacobucci, McLachlin/LeBel, Wagner) reflects a label of convenience, and does not imply that these individuals are the sole or even the major reason for the behaviour. We must remember "Henderson's Law," which avoids prematurely attributing to individual whim or idiosyncrasy changes in judicial behaviour that may really (or at least also) be functional responses by the institution as a whole to the challenges, threats and changing expectations with which the Court is dealing at any given time.[46] (Henderson was writing specifically about changes in the frequency and style of dissents, but the observation applies more generally.) It is the Court as an institution whose behaviour is evolving. It is worth noting that these individuals are to some extent "leading the way" at least in terms of sheer numbers, but the phenomenon does not reduce itself to their writing choices, nor is it by any means limited to them. All the current members of the Court have co-authored judgments or minority reasons; the phenomenon is not reducible to a single specific judge (currently Chief Justice Wagner) co-authoring more than any previous member of the Court (even Iacobucci), but rather characterizes the Court as an institution.

During its 140 plus years, the Court has undergone an important evolution in the way that it presents its judicial decisions, and these should very much be seen not as the product of happenstance or whim but rather as a conscious response to the way that the Court and its relevant publics understood its role and its relation to the law.

The first stage was the seriatim stage, which in its purest form involves every member of the panel independently writing complete (and often largely duplicative) reasons for their preferred outcome to an appeal, those sets of reasons being accumulated to generate an outcome (appeal allowed or appeal denied). Over time, the "every judge" aspect diminished somewhat,[47] and Hogg points out that since the Chief Justiceship of Anglin there was a deliberate attempt to contain the number of reasons to some extent,[48] but the critical point is that all of these (even the ones that wound up being dissents) were considered to be "judgments" and all were available as sources of precedent. As Gerhard puts it, it was not the deciding Court that had the say as to what the precedential impact of its immediate decision might be; rather, it was up to the judges on subsequent Courts gradually to develop a shared understanding of what that precedent

46. See Todd Henderson, "From Seriatim to Consensus and Back Again: A Theory of Dissent" [2007] Sup Ct Rev 283.

47. See Claire L'Heureux-Dubé, "The Length and Plurality of Supreme Court of Canada Decisions" (1990) 28:3 Alta L Rev 581.

48. Hogg & Amarnath, *supra* note 8 at 128.

"really" was, and this understanding itself could evolve over time.[49] Even when there might have been a majority opinion on the panel, "in the seriatim tradition, these opinions do not carry additional weight"[50] such that the solo reasons of other judges on the panel might very well have greater precedential impact. If we find ourselves thinking of the majority reasons as the "real" judgment, we are simply showing how strong is the hold of the protocol that came next. Initially, almost all the decisions of the Supreme Court took this full seriatim form, and it survived (particularly, for example, for the Court's responses to reference questions from the federal government) into the 1960s.

The second stage was the "single judgment" stage, which involved a single set of reasons (almost always[51]) being identified as carrying the special status that we now attach to a "judgment," with the other (minority) contributions being labelled as "reasons." We generally connect this shift to the Chief Justiceship of Cartwright, who established the procedural prerequisite to such a shift, namely a post-hearing judicial conference to determine the mood of the panel and to assign to a specific individual the responsibility for attempting an initial draft. In its fullest form, which I have described elsewhere,[52] all the minority reasons take the form of a self-acknowledged response to those reasons for judgment ("I have read the reasons"); more recently, the reasons for judgment themselves have sometimes come to include a section which is itself a response to those minority reasons.

What the rising practice of co-authorship suggests is that we are entering a third stage, characterized by a strong shift from an individualized to an institutionalized model, one that is quite distinct from the practices of any comparable common law national high court. This co-authorship is not incidental or occasional, but increasingly frequent and increasingly targeted on the more important elements of the caseload. It will, over time, change how we think about and talk about the Supreme Court and its decisions, just as the shift from seriatim to single-judgment necessitated such changes fifty years ago. That the Supreme Court has chosen not

49. See Michael J Gerhardt, *The Power of Precedent* (Oxford: Oxford University Press, 2008) at 62: "There was, in effect, no precedent until a later majority declared what it was."

50. Rebecca Gill, "Consensus or Ambivalence: Why Court Traditions Matter," online (2011) *SSRN*, DOI <10.2139/ssrn.1881961>.

51. It is occasionally the case that a fragmented majority differs within itself to the extent that a majority or plurality judgment cannot be identified; see for example *R v Brooks*, 2000 SCC 11, [2000] 1 SCR 237. At the other extreme, I have only found a single case that identified two non-identical judgments, because two members of the panel had signed both sets of reasons; see *Comite paritaire v Potash,* [1994] 2 SCR 406.

52. McCormick, "Structures of Judgment," *supra* note 9.

to highlight this important change in its own practices makes it more important, not less important, for us to take due notice of it.